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IN THE

Supreme Court of the United States

October Term, 1966

No. 1062

ROBERT A. SCHMITZ, *Petitioner*

v.

SOCIETE INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES, S. A. AND HENRY H. FOWLER, Secretary of the Treasury of the United States of America, *Respondents.*

HERMAN A. SCHMITZ, ROBERT A. SCHMITZ AND LLOYD J. VAIL, Executors of the Estate of Dietrich A. Schmitz, deceased, *Petitioners*

v.

SOCIETE INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES, S. A. AND HENRY H. FOWLER, Secretary of the Treasury of the United States of America, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Petitioners, Robert A. Schmitz, individually, and Herman A. Schmitz, Robert A. Schmitz and Lloyd J. Vail, executors of the estate of Dietrich A. Schmitz, deceased, respectively, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered on November 14, 1966. That order was docketed

in appeals from orders of the United States District Court for the District of Columbia dismissing petitioners' complaints, which appeals had been consolidated for all purposes by the Court of Appeals.[1]

DECISION BELOW

The decision of the Court of Appeals was rendered in the form of a judgment of affirmance without a formal opinion. The judgment was not published. It appears in Appendix A to this petition.

JURISDICTION

The judgment of the Court of Appeals was entered on November 14, 1966, affirming a final order of the United States District Court for the District of Columbia. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether the Secretary of the Treasury can properly plead sovereign immunity as a defense to a suit which seeks to impress an equitable lien upon pledged property maintained in the Treasury of the United States where title to the pledged property is in the name of a foreign corporate pledgor, the pledged property is in a segregated account bearing the pledgor's name, it is earmarked for payment to the pledgor, the Secretary of the Treasury intends to disburse the funds without notice to the lienor, and the actual disbursement will destroy the lienor's security interests in the fund and preclude the effective litigation of his claim.

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[1] In view of the fact that these cases involve the same question of law, a single petition for a writ of certiorari covering both cases is being submitted under authority of this Court's Rule 23(5).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

Amendment V of the United States Constitution, in part, provides:

> "No person . . . shall be deprived of . . . property, without due process of law; . . ."

40 U.S.C. § 308

§308. *Releasing property from attachment*

Whenever any property owned or held by the United States, or in which the United States has or claims an interest, shall, in any judicial proceeding under the laws of any State, district, or territory, be seized, arrested, attached, or held for the security or satisfaction of any claim made against such property, the Attorney General, in his discretion, may direct the United States Attorney for the district in which the property is located, to cause a stipulation to be entered into for the discharge of such property from such seizure, arrest, attachment, or proceedings, to the effect that upon such discharge, the person asserting the claim against such property shall become entitled to all the benefits of this section and section 309 of this title. Nothing herein contained shall, however, be considered as recognizing or conceding any right to enforce by seizure, arrest, attachment, or any judicial process, any claim against any property of the United States, or against any property held, owned, or employed by the United States, or by any department thereof, for any public use, or as waiving any objection to any proceeding instituted to enforce any such claim.

40 U.S.C. § 309

§309. *Payment*

In all cases where a stipulation is entered into under section 308 of this title, and, in consequence

thereof, the property is discharged, and final judgment is afterward given in the court of last resort to which the Attorney General may deem proper to cause such proceedings to be carried, affirming the claim for the security or satisfaction of which such proceedings have been instituted, and the right of the person asserting the same to enforce it against such property by means of such proceedings, notwithstanding the claims of the United States thereto, such final judgment shall be deemed, to all intents and purposes, a full and final determination of the rights of such person, and shall entitle such person, as against the United States, to such rights as he would have had in case possession of such property had not been changed. Whenever such claim is for the payment of money, and the same is by such judgment found to be due, the presentation of a duly authenticated copy of the record of such judgment and proceedings shall be sufficient evidence to the proper accounting officers for the allowance thereof; and the same shall thereupon be allowed and paid out of any moneys in the Treasury not otherwise appropriated. The amount so to be allowed and paid shall not, however, exceed the value of the interest of the United States in the property in question.

STATEMENT OF THE CASES

The complaints filed by petitioners in their respective civil actions alleged the existence of equitable liens in their favor in a fund in the Treasury of the United States of America belonging to respondent Societe Internationale pour Participations Industrielles et Commerciales, S. A. (hereinafter sometimes referred to as "Interhandel") and segregated in a special account maintained in its sole name. (R. 3, 23) This fund represents the proceeds accruing to Interhandel

from the sale of its stock in General Aniline and Film Corporation (hereinafter sometimes referred to as "GAF") pursuant to the stipulation of settlement filed in *Societe Internationale pour Participations Industrielles et Commerciales, S. A.* v. *Kennedy,* D.D.C. Civ. No. 4360-48. (R. 4-5, 23) In that suit Interhandel sought to obtain the return of its interest in GAF which had been seized by the United States during World War II as alleged enemy-owned property. Named as defendants in each of the present civil actions were Interhandel and the Secretary of the Treasury. The corporate defendant was served in each instance by mail pursuant to the provisions of Rule 4(i)(1)(D), Fed. R. Civ. P. (R. 13-14, 34-36) Personal service was effected upon the Secretary of the Treasury.

Both complaints proceeded on concurrent theories for the establishment of equitable liens, namely by virtue of express contracts and to avoid the unjust enrichment of Interhandel.

The complaint of petitioner Robert A. Schmitz. The agreement which underlies Count One of the complaint filed by petitioner Robert A. Schmitz, individually, is set forth in paragraphs seven through eleven thereof (R. 6-9), and must be considered in the context of Interhandel's continuing efforts to liquidate its holdings in GAF as described in paragraph six and seven of the complaint (R. 5-6). After having acted on behalf of several American companies which were interested in acquiring Interhandel's interests in GAF, and after having been encouraged in his efforts by Interhandel, Robert A. Schmitz was advised by the latter in December, 1958 that it had determined that it would discontinue further efforts to sell its GAF stock until

it could settle its long-pending action against the Attorney General. Interhandel proposed to negotiate with the United States government through a trustee as an intermediary who was familiar with the decision-making processes of the executive branch and who had the stature to deal with high officials as a peer. The individual petitioner's cooperation in obtaining the services of such a person was solicited. Petitioner indicated his willingness to work with respondent corporation and suggested the possibility of obtaining the services of Charles E. Wilson, former president of General Electric Company who then was serving under presidential appointment as President of the People to People Foundation (R. 6).

Recognizing that it would take a great deal of time, effort and ability to secure Mr. Wilson's consent to act as trustee on behalf of Interhandel, petitioner and respondent corporation entered into an oral agreement whereby petitioner would be compensated for his services on a contingent fee basis out of the proceeds of any settlement of the aforementioned Civil Action No. 4360-48 if he could bring about the proposed agency (R. 7). The fee percentage subsequently was agreed upon at 5% of the monies recovered (R. 9). Petitioner conducted extensive negotiations with both Mr. Wilson and Interhandel and eventually was able to draft trust powers which were acceptable to both of them. Upon Mr. Wilson's acceptance of the trust powers on May 23, 1960, petitioner had fully performed his obligations under the contract and thus became entitled to his compensation (R. 9).

Count one of the individual petitioner's complaint, in addition to alleging the existence of an express oral contract granting him an interest in the settlement pro-

ceeds, sets forth the nature of his contribution to the creation of the fund by virtue of time, effort and skill expended in the establishment of the Wilson trusteeship. The setting up of this trusteeship was an important step in bringing to an end the long pending suit by Interhandel against the Attorney General. This is brought out in paragraph 13 of Count one, wherein petitioner asserts:

> "Following Mr. Wilson's acceptance of the trust powers, and with plaintiff's continuous active cooperation, he entered into intensive negotiations with the highest officials of the United States government in an effort to convince them of the merits of defendant Interhandel's claim and the unfairness and injustice of the government's resistance thereto. Largely as a result of these efforts the image of defendant Interhandel was changed in the United States government circles, the most influential government officials were persuaded that justice demanded the recognition of its claims, the prompt settlement of Interhandel's suit was greatly facilitated and the favorableness of the terms were greatly enhanced." (R. 9-10)

Count Two of the complaint details petitioner's services to the trustee between June 1, 1960 and December 31, 1961, which enabled the trustee to render more effective service in his role as negotiator with the United States government. It proceeds on a *quantum meruit* basis for the reasonable value of the work performed by the said Robert A. Schmitz in furtherance of the trusteeship's objectives subsequent to its creation. (R. 10-11) Although no agreement was reached as to the rate or amount of compensation that petitioner was to receive for his continuing services to the Trustee and to Interhandel, it was understood that he would be compensated for this work. (R. 11).

The complaint of petitioners Herman A. Schmitz, Robert A. Schmitz and Lloyd J. Vail, executors. Dietrich A. Schmitz, whose executors also are petitioners herein, was president and chairman of the board of directors of General Aniline and Film Corporation from the date that company was formed until shortly before its seizure by the United States government in early 1942. (R. 24-26). During that period of time, decedent held Interhandel's proxies for all of its GAF stock which, of course, enabled him to elect GAF's entire board of directors and to direct its operations. (R. 24). In the language of the complaint, "decedent became and continued to be the sole trustee and attorney-in-fact for defendant Interhandel, with complete responsibility for fostering and protecting its interests in GAF, as well as the principal executive officer of GAF." (R. 24-25).

In the latter months of 1941, acting on a purported opinion of counsel that under certain Presidential Proclamations of Emergency foreign owners of stock in American companies were not entitled to vote their shares, a rump board of directors voted out decedent as the chief executive officer of GAF. (R. 26). Pursuant to express authority which he received from Interhandel (R. 26, 28), decedent challenged his ouster in the courts but, before the case could be reached for trial, GAF was seized by the government (R. 26). Thereafter, and in accordance with directives which decedent received from Interhandel, he continued to take all steps possible to protect Interhandel's interest in GAF and to resist the government's claim that GAF was enemy-owned. (R. 28-29).

The executors' complaint describes in detail the services which the late Dietrich A. Schmitz rendered to

Interhandel over the space of many years upon its request and with its knowledge, consent and encouragement (R. 28-29). It also suggests, for it cannot hope to portray fully, the personal sacrifice and financial loss which decedent suffered in his defense of an extremely unpopular cause (R. 27-30). As the chosen instrumentality of Interhandel to manage the business and affairs of its subsidiary, General Aniline and Film Corporation (R. 24), the complaint makes it clear the decedent was responsible to Interhandel to preserve as best he could, the trust that had been placed in him (R. 28-29). With Interhandel's knowledge, consent and encouragement, decedent resisted all efforts to wrest control of GAF from respondent corporation—filing suit on its behalf where such was feasible and possible (R. 26); providing GAF's defenses to various criminal anti-trust indictments (R. 27); representing Interhandel's interests at Congressional hearings inquiring into the true ownership of GAF (R. 27-28); and generally doing whateved could be done to deny and disprove the allegations that GAF was actually owned by German interests (R. 29). Interhandel's recognition of decedent's meritorious claim for the reasonable value of these services prompted it, after the termination of World War II, to supplement this implied contract to compensate decedent by expressly affording him a security interest in whatever funds ultimately were recovered from the United States government in settlement of the GAF controversy. (R. 31).

The complaints filed by petitioners in District Court sought injnctions against the Secretary of the Treasury to enjoin him from disbursing any portion of the Interhandel fund unless and until provisions were

made for the satisfaction of their liens. (R. 11, 31-32). They also prayed that, if necessary, receivers be appointed to receive and hold portions of the fund equal to the amounts of their liens, i.e., $7,362,000.00 and $10,000,000.00, respectively, pending determination of their civil actions on the merits; that $17,362,000.00 of the fund be declared trusts for the benefit of petitioners and the amounts found to be owing to them ordered paid; and that judgments be entered against Interhandel in the full amounts of the liens, plus interest. (R. 11-12, 32). In lieu of filing formal answers to these complaints, respondents each filed motions to dismiss which were granted by the District Court. (R. 55, 56). The orders of dismissal provided that the court's action was taken without prejudice to the filing of new claims when "defendant Secretary has funds in his possession solely for distribution after release thereof by the Attorney General." (R. 55, 56) See *Schmitz* v. *Societe Internationale,* 249 F. Supp. 757 (D.D.C. 1966). On appeal the orders of the District Court were affirmed without modification. (App. A, p. 1a).

At the hearing in District Court upon respondents' motions to dismiss petitioners' complaints, the Court inquired of counsel for petitioners whether any effort had been made to obtain the cooperation of the Department of Justice with regard to timing and filing of petitioners' suits. Thereafter, by letters dated February 7 and November 1, 1966, and January 17, 1967, counsel for petitioners requested the government to give him notice of intended disbursements to Interhandel from the fund. (App. B, D, F, pp. 2a, 7a, 10a). To date, the government has refused this request, (App. C, E, G, pp. 6a, 9a, 12a), and, in fact,

has made disbursements to Interhandel without any notice. (Compare App. D and E pp. 7a, 9a). The government specifically disavows any intention to maintain the Interhandel fund at a sufficient level to satisfy petitioners' claims against respondent corporation. (App. E, p. 9a).

REASONS FOR GRANTING THE WRIT

I.

THE COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT

A. The Complaints Filed by Petitioners in District Court Properly Alleged The Existence of Equitable Liens in Their Favor upon the Interhandel Fund

The allegations set forth in petitioners' complaints, which respondents have admitted for purposes of their motions to dismiss, place these suits in the classic pattern of equitable lien cases, typified by *Barnes* v. *Alexander,* 232 U.S. 117 (1913); *Orinoco Co.* v. *Orinoco Iron Co.,* 54 App. D.C. 218, 296 Fed. 965, *appeal dismissed,* 265 U.S. 598 (1924), and *McCormack* v. *Harrah,* 60 App. D.C. 260, 51 F.2d 316 (1931), in which persons who had made significant contributions toward the creation of funds were accorded liens on the theory that they should be compensated for the valuable services they had rendered. Here, as in the *Barnes* and *McCormack* cases, by virtue of express agreements with respondent Interhandel, petitioners have received an interest in, and consequently a charge upon, the fund in question as compensation for the services which they rendered to Interhandel. In addition, they performed valuable services which directly pertained to the creation of the fund itself, as in *Orinoco Co.* v. *Orinoco Iron Co.,* for which, in justice and equity, they

ought to be compensated. Thus, with the exception of the lien asserted in Count Two of the Complaint filed by petitioner Robert A. Schmitz, individually, which proceeds solely upon the latter theory, petitioners have not one, but two concurrent bases on which to predicate their liens. See 4 Pomeroy, *Equity Jurisprudence*, §§ 1233-35, 1238-39 (5th ed. 1941); McClintock, *Equity*, § 118 (2nd ed. 1948).

B. The Interhandel Account in the United States Treasury is Subject to Petitioners' Equitable Liens at the Present Time

1. The fund is the property of Interhandel

In accordance with the stipulation of Settlement filed in *Societe Internationale, etc.* v. *Kennedy*, Interhandel's share of the proceeds of the sale of its stock in GAF is maintained by the Treasury in a segregated, special account bearing Interhandel's name. Stipulation, Section VIII, subsection 1 (R. 66). Indeed, counsel of record for respondent corporation, in affidavits which he filed in District Court in the instant proceedings, has admitted that the cash and securities in that account are his client's property. (R. 16, 40). Not only does the stipulation make reference to Interhandel as the "absolute owner" of its share of the proceeds, Stipulation, Section VI, subsection 3 (R. 65), and as being "entitled to" the proceeds, Ibid. at subsection 4, but it also provides for the payment of interest to Interhandel while its property remains in the Treasury, and for the payment of income taxes by Interhandel upon such interest. Stipulation, Section VIII, subsection 3 (R. 67).

Interhandel seeks to postpone and thereby to defeat the impression of petitioners' liens upon the fund by arguing that the fund is held by the government as

collateral security for the faithful performance of respondent corporation's indemnification obligations under this stipulation. This delaying tactic must fail, however, because the fact remains that Interhandel—just as any other pledgor or mortgagor—has a general property interest in the fund upon which a lien may be impressed. *The Richmond* v. *Cake,* 1 App. D.C. 447, 461 (1893); cf. *Dollar* v. *Land,* 87 U.S. App. D.C. 214, 184 F.2d 345, *cert. denied,* 340 U.S. 884 (1950); *Pilger* v. *Sutherland,* 61 App. D.C. 84, 57 F. 2d 604 (1932). In this respect, certain language used by the Court in *Dollar* v. *Land, supra,* has a particular significance. There, the Court declared:

> "Where the debt continues intact and the creditor releases a surety upon deposit of a paper security, the creditor does not by that transaction alone become absolute owner of the security thus deposited. He holds it as pledgee. Any other conclusion, if the transaction were between private parties, would be wholly untenable in our opinion. We do not see why the transaction should have a different essential nature merely because a Government agency was a party." 87 U.S. App. D.C. at 225, 184 F. 2d at 256.

2. The government's interest in the fund does not insulate it from petitioners' liens

The mere fact that the government may have a possessory interest in a particular fund does not preclude other creditors of the owner of that fund from asserting their liens against it. The most common illustration of this principle is the case in which the government files a tax lien against a debt-ridden taxpayer whose property is subject to various other liens. Of course, the question of priorities in such an instance is controlled by statute, e.g., Internal

Revenue Code, § 6323. The significance of such a situation to the present appeals, however, is that the mere existence of a lien in favor of the government—while perhaps relegating other liens to a subordinate position—does vitiate those other liens. Nor does it prevent other creditors from thereafter asserting their liens against the fund. See *Stevan* v. *Union Trust Co.*, 115 U.S. App. D.C. 36, 316 F.2d 687 (1963); *United States* v. *Leventhal*, 114 U.S. App. D.C. 340, 316 F.2d 341 (1963).

That governmental and non-governmental interests in the Interhandel fund can exist side by side is pointed up by the provisions of 40 U.S.C. §§ 308, 309 (1958 ed., as amended). Section 308 provides that whenever any property in which the United tSates may have any interest shall be attached as security for any claim made against the property, the Attorney General may cause a stipulation to be entered by the local U. S. Attorney in the district where the property has its situs for the discharge of such property from the attachment. The statute further provides that the consideration for such stipulation would be an agreement by the government that upon such discharge the person asserting the claim against the attached property shall become entitled to all of the benefits of that section and section 309. That latter section sets forth the procedure for the payment of claims pursuant to a final judgment in such proceeding. See *Garden Homes, Inc.* v. *Mason*, 238 F.2d 654 (1st Cir. 1956). As indicated in the Senate Report on the proposed 1965 amendments, the Department of Justice looked upon sections 308 and 309 as setting up a procedure which could be invoked to protect litigants who have attached property of the federal government without

depriving the government of the use of its property. S. Rep. No. 234, 89th Cong., 1st Sess., p. 5 (1965).

To be sure, sections 308 and 309 do not contain any consent to sue the government, and section 308 specifically declares that its enactment was not intended to broaden any pre-existing rights in private litigants. By implication, however, these statutes make it clear that where rights in property "owned or held by the United States, or in which the United States had or claims an interest" independently exist, private litigants may impress their liens and levy their attachments notwithstanding the concurrent government interest.

3. Petitioners have offered to subordinate their liens to the government's interest but the offer has not been accepted

Offering to do equity just as they seek equity, and confident that the Interhandel fund was more than adequate to meet any claims which might conceivably be filed against the government in connection with its operation of GAF and the sale of the GAF stock, petitioners offered in writing during the course of the District Court proceedings to postpone receipt of the monies to which they are entitled until the government is satisfied that such monies can be disbursed without injury to its security interest in the fund. Petitioners proposed doing this in either of the following ways:

(a) by entering into a formal stipulation with the Attorney General or with the U. S. Attorney for the District of Columbia pursuant to 40 U.S.C. § 308, or

(b) by stipulating in advance with respondent Secretary of the Treasury that they will agree to the stay of execution of any judgments rendered in their favor until such time as

> the government is satisfied that such monies can be disbursed without injury to its security interest in the fund.

The government has refused to act on this offer.

All that petitioners seek in these proceedings is an early, effective opportunity to present evidence in support of their claims. To the extent that this can be facilitated by renewing their offers to formally subordinate their liens to the government's interest in the fund, petitioners hereby restate their willingness to enter into the aforementioned stipulations with the appropriate government officials. Certainly, a court of equity is not lacking in power to mold a decree which would effectuate the terms of such agreements.

C. Petitioners' Suits Can Be Maintained Against the Government at the Present Time

1. The doctrine of sovereign immunity does not preclude the relief petitioners seek

In *Dugan* v. *Rank,* 372 U.S. 609 (1963), the Court set forth the criteria which would permit the United States, or an officer or agent thereof, to claim immunity from suit. They are as follows:

> "The general rule is that a suit is against the sovereign if 'the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration,' Land v. Dollar, 330 U.S. 731, 738, 91 L.ed. 1209, 1215, 67 S. Ct. 1009 (1947), or if the effect of the judgment would be 'to restrain the Government from acting, or to compel it to act.' Larson v. Domestic & Foreign Commerce Corp., supra (337 U.S. at 704); Re New York, 256 U.S. 490, 502, 65 L. ed. 1057, 1062, 41 S. Ct. 558 (1921)".

372 U.S. at 620

For the reasons set forth in the succeeding subsections of this petition it will be seen that the doctrine of sovereign immunity was not properly invoked in these cases.

2. The judgments sought herein by petitioners would not expend themselves on the public treasury or domain, and would not interfere with public administration

Petitioners herein are seeking to impress their equitable liens upon property which belongs to respondent corporation. The interest of the United States regarding that fund is strictly that of a pledgee. It has no interest in the pledged property other than a right to go to court to attempt to foreclose upon it in the event that Interhandel fails to perform its obligations under the Stipulation of Settlement. Such is made clear by the ruling of the U.S. Court of Appeals for the District of Columbia Circuit in *Hawley* v. *Hawley,* 72 App. D.C. 376, 114 F.2d 745 (1940).

The government's entire interest regarding the fund is derived from its private, out-of-court, agreement with Interhandel. The pledged property was intended simply to afford the government a means whereby it could protect itself from the remote possibility that somebody or some foreign government might assert some claim against the United States, presumably in connection either with its management of GAF or the sale of Interhandel's interest in GAF. The Stipulation of Settlement itself sheds no light upon the identity of these potential claimants or upon what might be the subject matter of their claims. Indeed, considering the restrictions imposed upon any of these unknown claimants by either the statute of limitations or the doctrine of sovereign immunity, it is difficult to

conceive the possibility that there could be any successful claims made. That the United States realizes this is illustrated by the fact that apparently it already has released approximately $90,000,000.00 of the fund to respondent corporation. (R. 47; compare App. D and App. E, pp. 7a, 9a.)

The instant suits in facts are suits against the fund itself and do not seek to recover anything from the government. See *Orinoco Co.* v. *Orinoco Iron Co., supra,* 54 App. D.C. at 225, 296 Fed. at 972. Accordingly petitioners' positions with respect to the United States are neither antagonistic nor competitive. But even if they were, petitioners' offer to formally subordinate their liens to the government's indemnity interest would overcome such an objection. Moreover, as pointed out *supra,* equity has ample power to frame its decrees in such a way as to avoid unnecessary injury to non-offending litigants, such as petitioners and respondent Secretary in the instant case. If there were any possibility that the government's indemnity interest could be adversely affected by judgments in favor of petitioners, it would be an easy matter for a court of equity to stay, or condition, the effect of its own judgments.

Nor do petitioners' suits interfere in any way with any matter of public administration. All permissible actions that may be taken with respect to the Interhandel fund are prescribed in great detail in the Stipulation of Settlement. No demands are presented in the instant suits with regard to the administration of the fund.

3. The judgments sought herein by petitioners would not restrain the government from acting, or compel it to act, with regard to any matter of a discretionary nature.

The rulings by this Court in *Mellon* v. *Orinoco Iron Co.*, 266 U.S. 122 (1924), and in *Houston* v. *Ormes*, 252 U.S. 469 (1920), and by the U.S. Court of Appeals for the District of Columbia Circuit in *McCormack* v. *Harrah, supra,* and in *Doerschuck* v. *Mellon,* 60 App. D.C. 383 55 F.2d 741 (1931), demonstrate that the judgments sought by petitioners herein, requiring the Secretary of the Treasury to satisfy their equitable liens from the fund presently in his hands, would require him to perform a purely ministerial duty. As already pointed out, the fund in question has been earmarked for payment to Interhandel and—unless the government takes affirmative action to foreclose upon the fund in the meantime—it is understood by all that the fund will in due course be distributed to Interhandel. If it should become necessary to do so, Interhandel itself may demand distribution as a matter of right. That the act of making distribution, where ownership of the fund is not in issue, is a ministerial duty may be confirmed by reference to the cases cited at the beginning of this paragraph.

Respondent corporation's ownership of the fund in question is more clearly demonstrable in this case than in perhaps any other. The claimants in *Houston, Orinoco Co.* and *McCormack* each enjoyed, at best, an undivided interest in the general funds of the United States. Their money was commingled with that of the government. Here, Interhandel's property has been segregated in a special account. Its property earns interest from the United States and it is required to pay taxes on that income.

Respondents argue that the matter of payment involves the exercise of discretion by the Attorney General and, therefore, that the judgments sought by petitioners would interfere with his performance of this discretionary act. The argument is based upon the fact that the Stipulation of Settlement—which only is binding upon the parties thereto *inter se*—provides that no distribution shall be made to Interhandel unless the funds involved are first released by the Attorney General. (Section VIII, Sub-section 1; R. 66) They look to *Kelberine* v. *Societe Internationale,* ..... U.S. App. D.C. ....., 363 F.2d 989 (1966), *cert. denied,* 35 U.S.C. Week 3210 (U.S. Dec. 12, 1966), for comfort, but what is said there should not be controlling in these appeals.

The thrust of appellants' argument in *Kelberine* was not directed toward the interpretation or the implementation of the Stipulation, but rather towards its validity. They directly challenged the authority of the United States to enter into the Stipulation in the first place and sought to have it set aside. By so doing they not only sought to interfere with the government's security interest in the fund, but they boldly attempted to restrain the government from acting with regard to a matter of a discretionary nature, i.e., settling Civil Action No. 4360-48. For these reasons, *Kelberine* did not fit into the pattern of *Mellon* v. *Orinoco Iron Co.,* 266 U.S. 122 (1924), and *Houston* v. *Ormes, supra,* as do the present cases. In fact, appellants Kelberine and Berlin did not even claim an equitable lien. Noteworthy is the Court's conclusion in *Kelberine* that appellants failed to present a "thesis" which was "susceptible of judicial implementation." 363 F.2d at 995.

The order of the Attorney General in the instant cases, unlike the various certifications and authorizations alluded to in *Mellon* v. *Orinoco Iron Co.; Houston* v. *Ormes,* and *McCormack* v. *Harrah,* has nothing whatever to do with the ownership of the fund in question. The fund belongs to Interhandel without the need for the Attorney General to take any action.

Until such time as the government might successfully foreclose upon the fund, it can have no interest in any portion of the pledged property which would insulate it from petitioners' liens. Consequently, there is no requirement that petitioners delay in asserting and enforcing their equitable liens upon the fund until the government's claim becomes liquidated, if it ever does. In addition, it should be noted that none of the cases previously cited in this subsection prescribes as a condition to the assertion of an equitable lien upon a fund in the United States Treasury that the anticipated distribution must be scheduled to take place immediately or within any specified period of time. It is enough that, in due course, distribution to a known payee will take place.

The Secretary of the Treasury, as *de facto* trustee of the fund, has a duty to distribute the fund to the persons entitled to receive it. The fact that Interhandel has entered into an out-of-court stipulation with the government can have no effect upon petitioners' claims or upon their equitable interest in the fund. Accordingly, the duty to disburse being but a ministerial act under the circumstances of this case, petitioners should be permitted to impress their liens upon the fund at this time.

D. The Doctrine of Sovereign Immunity Is Not Available to Protect Strictly Private Interests

By affirming the rulings of the District Court dismissing petitioners' complaints, the Court of Appeals has sanctioned the invocation by the government of the doctrine of sovereign immunity solely to enable Interhandel to receive at the earliest possible time the entire share of the GAF settlement proceeds allocated to it under the provisions of the Stipulation of Settlement filed in Civil Action No. 4360-48. No other conclusion is possible under the circumstances of these cases since, as already demonstrated, these suits do not interfere with any property right or discretionary activity of the United States Government. Accordingly, the only beneficiary of the invocation of the doctrine of sovereign immunity is Interhandel. This novel use of one of the supreme attributes of sovereignty for the protection of a private litigant rather than for the protection of the public raises an important question of federal law which has not been, but should be, settled by the Court. Is the matter of "keeping faith" with one who contracts with the government such an important matter that the government can invoke the doctrine of sovereign immunity to enable it to perform without interference its end of a bargain? Petitioners submit that the doctrine of sovereign immunity was meant to protect only the government and that its use should be circumscribed accordingly.

II

EQUITABLE PRINCIPLES REQUIRE THAT PETITIONERS BE PERMITTED TO IMPRESS THEIR LIENS AT THIS TIME

The familiar maxims that "equity regards as done that which ought to be done" and that "equity will not suffer a wrong without a remedy" have particular

application to the facts of the instant case. Petitioners have rendered substantial services to respondent corporation throughout the years and have contributed materially to the creation of the fund which is presently maintained in the hands of the Secretary of the Treasury. Both by virtue of express executory agreements and in order to prevent Interhandel from being unjustly enriched at their expense, petitioners possess equitable liens upon that fund which entitle them to obtain compensation for their services out of that fund. Their liens are the only effective means by which the personal obligations of Interhandel toward petitioners may be enforced Yet respondents herein have sought to deny petitioners their liens and, unless this Court will take appropriate action to preserve them, petitioners' equitable liens will almost certainly be lost.

The Interhandel fund is petitioners' security. They seek only the opportunity to prove their claims against that fund but their efforts are being thwarted by respondents' unjustifiable resort to the doctrine of sovereign immunity. If respondents are permitted to take refuge behind this doctrine, the fund will disappear and petitioners will be denied their compensation. Approximately $90,000,000.00 of the fund already has been disbursed to Interhandel without any prior public announcement. That sum has been transferred beyond the reach of any court of the United States. In due course, the balance will follow in the same way unless this court intervenes. Petitioners do not think that in justice and equity they should be required to play the old shell game with Interhandel in their attempt to secure their share of the fund.

CONCLUSION

This case presents an important issue involving the limits of the doctrine of sovereign immunity which this Court has not heretofore passed upon and which has been wrongly decided by Courts below. The petition for certiorari should therefore be granted.

Respectfully submitted.

DANIEL W. O'DONOGHUE
ROSS O'DONOGHUE
420 Union Trust Building
Washington, D. C. 20005
Attorneys for Petitioners

February, 1967.

APPENDIX

APPENDIX A

[Filed Nov. 14, 1966]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1966

No. 19,995
Civil 1900-65

ROBERT A. SCHMITZ, Appellant,

v.

SOCIETE INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES, S. A., ET AL., Appellees.

No. 19,996
Civil 2091-65

HERMAN A. SCHMITZ, ET AL., Executors of the Estate of Dietrich A. Schmitz, deceased, Appellants,

v.

SOCIETE INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES, S. A., ET AL., Appellees.

Appeals from the United States District Court for the District of Columbia.

Before: Wilbur K. Miller, Senior Circuit Judge, and Wright and McGowan, Circuit Judges.

Judgment

These cases came on to be heard on the record on appeals from the United States District Court for the District of Columbia, and were argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this court that the orders of the District Court appealed

from in these cases are hereby affirmed on the opinion of the District Court, *Schmitz* v. *Societe Internationale,* D.D.C., 249 F.Supp. 757 (1966). See *Kelberine* v. *Societe Internationale, etc.,* —— U.S.App.D.C. ——, 363 F.2d 989 (1966).

Per Curiam

Dated: Nov. 14, 1966

APPENDIX B

February 7, 1966

Honorable Nicholas deB. Katzenbach
Attorney General of the United States
United States Department of Justice
Washington, D. C. 20025

Re: Robert A. Schmitz v. Societe Internationale Pour Participations Industrielles et Commerciales, S. A., et al
Civil Action No. 1900-65

and

Herman A. Schmitz, et al, Executors of the Estate of Dietrich A .Schmitz, deceased v. Societe Internationale Pour Participations Industrielles et Commerciales, S. A. et al
Civil Action No. 2091-65, in the United States District Court for the District of Columbia

Dear Sir:

I represent Robert A. Schmitz, individually, and Robert A. Schmitz, Herman A. Schmitz, and Lloyd J. Vail, executors of the estate of Dietrich A. Schmitz, deceased, in connection with equitable liens that they have against a fund in the Treasury of the United States in the name of Societe Internationale Pour Participations Industrielles et Commerciales, S.A., commonly known as Interhandel. Although this fund originally amounted to $121,000,000, it has now been reduced by $60,000,000 upon your authorization

to the Secretary of the Treasury. This fund was set up and maintained and your release and disbursements have been made pursuant to a stipulation of settlement entered into in *Societe Internationale* v. *Kennedy,* Civil Action No. 4360-48 in the United States District Court for the District of Columbia.

On behalf of my clients I instituted suits against the Secretary of the Treasury in Civil Actions Nos. 1900-65 and 2091-65 in the same District Court. These suits constitute an attempt to enforce the equitable liens against the fund in the Treasury. These suits allege that the fund is in fact the property of Interhandel, although on deposit in the Treasury as a pledge to secure the United States against possible liability in the event certain types of claims are filed. It is our contention that there is no discretionary function to be exercised either by the Attorney General or the Secretary of the Treasury, but only a ministerial one to perform upon the occurrence of certain events. In any event, we contend that whatever the United States' interest might be, Interhandel had a title capable of attachment.

Motions to Dismiss were made on behalf of the Secretary of the Treasury and by Interhandel. The Secretary was represented by Mr. Robert Wieferich of your department. The basis of the government's motion was that the United States had an interest in the fund, that the suits were an attempt to control the discretion of the Attorney General and that therefore they constituted unconsented suits against the United States. Judge David A. Pine of the District Court went along with this argument and filed a sixteen page opinion in which he held, in effect, that the suit was premature and granted the motion to dismiss without prejudice to my clients' reasserting the lien at such time as a release of the fund or any portion thereof was made by you. It would then become, he suggested, a ministerial duty on the part of the Secretary of the Treasury to disburse the funds which might thereupon be at-

tached by suit in accordance with a familiar line of cases in the Supreme Court and the United States Court of Appeals for the District of Columbia.

In the course of argument, Judge Pine inquired whether any request had been made of you to notify me or my clients of the original release or any request that we be notified of an intention on your part to authorize future disbursements. I replied that no such request had been made, but the tenor of Judge Pine's remarks was that such a request might very well be entertained by you. I therefore request you to notify me, as attorney for the claimants, when you propose in the future to authorize the Secretary of the Treasury to disburse funds to Interhandel. You can appreciate the difficult situation in which we find ourselves in that it is essential that the claim not be asserted too early or too late. Before your authorization, the District Court held that it is too early. After your authorization, the disbursement might well be made before we have knowledge of the situation and therefore, subsequent to the actual disposal of the funds to the foreign corporation. Thereafter, the Courts of the United States would lose jurisdiction entirely and it would be necessary for my clients to pursue their doubtful remedies in a foreign court.

I invite your attention to the allegations of the two complaints. The one on behalf of the estate of Dietrich A. Schmitz alleges that he was president of General Aniline & Film, the United States corporation, the sale of whose stock provided the entire fund from which both the United States and Interhandel have been paid. It recounts his long efforts and severe losses on behalf of his Swiss principal, Interhandel, and sounds in both quasi contract and in contract, since it alleges the promise to make him whole from the fund when it was received. The suit by Robert A. Schmitz, the son of Dietrich, outlines the work he did for Interhandel in connection with its attempts to establish its rights to the stock in General Aniline and Film and its

promise to him to pay him 5% of any recovery provided he obtained the services of Mr. Charles A. Wilson, former president of the General Electric Company, to act as trustee on its behalf. It recites the accomplishment of this requirement. The plaintiffs, of course, are all American citizens, who have played a very vital part in the long history of the formation and operation of General Aniline and Film, its seizure by the government and the ultimate settlement whereby Interhandel received a large proportion of its original claim. It would be but simple justice that these individuals be given their day in court. It would be a cruel mockery of justice if they were denied the right to establish their liens by reason of their ignorance of the date of the release of the fund and its disbursement by the Secretary of the Treasury, all of which could happen in very short order.

We do not believe that Judge Pine's decision was legally correct and therefore have filed notices of appeal in each case. We will, of course, actively prosecute these appeals but the simple solution would be an agreement from you to give us notification at the appropriate time. This would enable us to accord with Judge Pine's decision and moot the appeals.

This letter is, therefore, written to request that you, in the interest of justice and fair play, give them an opportunity to assert their liens at such a time as you determine that the United States has no further interest therein. Alternatively, the plaintiffs have offered in their pleadings, and renew their offer now, to an agreement pursuant to the provisions of Sections 308 and 309 of Title 40 of the United States Code. This would result in an agreement between my clients and the United States to recognize the priority of the government's interest and to assent to a junior position in the assertion of their liens. In the past you, in your capacity of Deputy Attorney General, have recognized the interest of Robert A. Schmitz and his father in this matter, and in a letter written by you several years

ago at the request of Attorney General Kennedy, expressed your and his appreciation of Robert Schmitz' cooperation with the government.

Accordingly, I solicit your favorable consideration of this request and request that you advise me that you will give my clients ample opportunity at the appropriate time to assert their liens against the fund in Interhandel's name or alternatively, enter into a stipulation as hereinabove suggested.

Respectfully submitted,

Ross O'Donoghue

APPENDIX C

June 30, 1966

Mr. Ross O'Donoghue
Union Trust Building
Washington, D. C.

Dear Mr. O'Donoghue:

The Attorney General has asked me to reply to your letter of February 7, 1966 which he acknowledged in his letter of February 17, 1966. After consideration of the requests discussed in your letter and the countervailing considerations presented by Mr. Wilson, it has been decided that it would be inappropriate to enter into a stipulation under 40 U.S.C. 308, 309 or to give you notice at this time of any determination made under Section VIII: 4. of the stipulation of settlement in the Interhandel case. You are aware, of course, of Judge Pine's view, stated in his opinion of January 19, 1966 in a somewhat different context, that the provisions of 40 U.S.C. 308, 309 are not appropriate to the handling of this matter.

We do not believe that denial of your requests at this time adversely affects your clients. We have no intention, for example, of permitting the reduction, in the immediate future, of the Interhandel fund in the Treasury to a point

where it would be inadequate to satisfy the demands of your clients. Meanwhile you may have the opportunity, by the means suggested by the Kelberine decision, to prosecute the merits of your claims directly against Interhandel. The facts thus judicially developed might shed a different light on your requests.

Yours very truly,

ANTHONY L. MONDELLO
Deputy Director
Office of Alien Property

APPENDIX D

November 1, 1966

Honorable Ramsey Clark
Acting Attorney General of the United States
United States Department of Justice
Washington, D. C. 20025

Re: Robert A. Schmitz v. Societe Internationale Pour Participations Industrielles et Commerciales, S. A., et al
Civil Action No. 1900-65

and

Herman A. Schmitz, et al, Executors of the Estate of Dietrich A. Schmitz, deceased v. Societe Internationale Pour Participations Industrielles et Commerciales, S. A., et al
Civil Action No. 2091-65, in the United States District Court for the District of Columbia

Dear Sir:

This letter is in further reference to my letter of February 7, 1966, to your predecessor, the Honorable Nicholas deB. Katzenbach, and the reply thereto dated June 30, 1966, by Mr. Anthony L. Mondello, which letter was written

at the request of Mr. Katzenbach. I will not undertake here to repeat the outline of the situation and the problems which are of such concern to my clients and me. This was done in detail in my letter of February 7.

I write this letter because I learned for the first time last Thursday, at the argument of the aforesaid cases in the Court of Appeals, that the Attorney General recently released to Interhandel an additional $30,000,000.00 of the Interhandel fund. I am not aware of the date of this payment for I had no knowledge that any plan of this kind was even contemplated. Needless to say, my clients and I are much distressed by this action which we feel tends to prejudice our case.

We seek an opportunity to enforce the equitable liens asserted in these suits and the portion of the fund recently released to Interhandel would have been more than adequate for this purpose. There was a period of time when this could have been done and when you would have had to concede that the Secretary of the Treasury had the mere ministerial duty to pay the funds. That this additional $30,000,000.00 was disbursed to Interhandel makes it evident that you have little fear that the United States will need any of the Interhandel funds to indemnify it from possible claims against the United States. Doubtless, the fact that no such claims have been asserted, coupled with the passage of considerable time since the fund was created, fortifies you in your belief that no such claims ever will be made. You are no doubt also confident that if any such claim ever were asserted that Interhandel would take appropriate steps to hold you harmless and further that the United States could have the adequate defense of sovereign immunity to such a claim. I assume, therefore, based on the letter of Mr. Mondello of June 30, that the amounts now left in the Treasury are retained more for the purpose of protecting my clients than out of fear of any concern on your part that the United States will ever have to look to this fund for indemnification. Although this action of

further release of funds is eloquent of this belief, nevertheless, your representative in the Court of Appeals, Mr. Salzman, still insists that the possibility of claims is an actual concern of yours.

In an effort to crystallize the present situation and in the interests of fair play, I would appreciate a statement from you that no claims cognizable under the provision of the stipulation between the Attorney General and Interhandel have been made and that there is now little reason to anticipate that any will be made. I would like to know the facts as to these circumstances so that I can assure the Court that the interest of the United States in these funds is now either non-existent or extremely minimal.

Respectfully,

Ross O'Donoghue

APPENDIX E

Assistant Attorney General
Civil Division

DEPARTMENT OF JUSTICE
Washington 20530

November 21, 1966

Mr. Ross O'Donoghue
Union Trust Building
Washington, D. C. 20005

Dear Mr. O'Donoghue:

This will acknowledge your letter of November 1, 1966 to the Acting Attorney General.

As you know, the sole basis for the retention of Interhandel funds permitted by the stipulation of settlement

in the Interhandel case relates to the potential need for indemnification of the United States. Contrary to the suggestions contained in your letter, the current balance of the Interhandel fund is not being retained for the protection of your clients, but only for the protection of the interests of the United States under the agreement with Interhandel.

In response to your specific requests you should know that while no claims which would trigger the indemnification provisions of the stipulation have yet been made, we have no assurance that none will ever be made. Accordingly, we cannot furnish you with the statement you desire.

Sincerely,

/s/ BAREFOOT SANDERS
Barefoot Sanders
Assistant Attorney General

APPENDIX F

January 17, 1967

Honorable Ramsey Clark
Acting Attorney General of the United States
United States Department of Justice
Washington, D. C. 20025

Dear Sir:

You are familiar with the claims of Robert A. Schmitz and the Estate of Dietrich A. Schmitz against Societe Internationale Pour Participations Industrielles et Commerciales, S.A., commonly known as Interhandel. You will remember that suits were filed against Interhandel and the Secretary of the Treasury. The suits were numbered 1900-65 and 2091-65 respectively, in the United States District

Court for the District of Columbia. They asserted a lien by the plaintiffs in each case against the fund in Interhandel's name in the Treasury of the United States as a result of the sale of the stock of General Aniline and Film Corporation. The suits were dismissed and the dismissals were sustained by the Court of Appeals on the theory that the United States had an interest in the fund, however contingent it might be.

During the pendency of those suits substantial additional amounts were released by the Attorney General and disbursed by the Secretary of the Treasury without our having an opportunity to assert a lien against the released funds at a time when they were still in the Treasury of the United States subject only to the ministerial duty of the Secretary to pay out the funds. However, we are advised that some substantial amount still remains in the Treasury and pursuant to the suggestions made at oral hearing by members of the Court of Appeals and following the teaching of *Kelberine* v. *Societe Internationale, etc.*, 363 F.2d 989, decided by the United States Court of Appeals for the District of Columbia on April 7, 1966, we have now filed suits against Interhandel alone, serving their local agent and attorney, John J. Wilson.

This letter is to advise you of the existence of the suits, the claims against the fund and the propriety of your holding what remains of the fund intact until a disposition can be had of the present suits. I will not again rehearse the various considerations concerning the merits of our claim and the untenable position we might find ourselves in in the event of distribution, since I set out those various factors in my correspondence with your predecessor. I trust therefore, that in the interest of justice, you will not authorize further disbursements during the pendency of these suits. I also hope that you will notify me when the United States is in a position to state that it has no further claim against the fund and that its only concern is that it

be disbursed in accordance with the various claims thereto, whether by Interhandel or by these plaintiffs.

Respectfully,

Ross O'Donoghue

APPENDIX G

Feb. 3, 1967

Mr. Ross O'Donoghue
Union Trust Building
Washington, D. C. 20005

Dear Mr. O'Donoghue:

This will acknowledge your letter of January 17, 1967 to Acting Attorney General Clark which requests that no further disbursements from the Interhandel fund be authorized during the pendency of your clients' suits against Interhandel, and that you be notified when the United States is in position to state that it has no further claim against the fund.

The facts referred to in your letter do not appear to change the substance of the questions discussed in your letter of November 1, 1966 to Mr. Clark, and in our response of November 21, 1966. Also, matters closely similar to the requests you make were at issue in the *Kelberine* litigation, and were decided by the Court of Appeals adversely to persons who are in the position of your clients. The Supreme Court recently denied certiorari in that case. We see in these circumstances no reason to change the view stated in our earlier letter.

Sincrely yours,

Barefoot Sanders
Assistant Attorney General

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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1062

ROBERT A. SCHMITZ, ET AL., PETITIONERS

v.

SOCIETE INTERNATIONALE, ETC. (INTERHANDEL) AND HENRY H. FOWLER, SECRETARY OF THE TREASURY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE SECRETARY OF THE TREASURY IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (J.A. 44)[1] is reported at 249 F. Supp. 757. The court of appeals rendered no opinion, but affirmed the judgment below "on the opinion of the District Court" (Pet. App. 1a–2a).

JURISDICTION

The judgment of the court of appeals (Pet. App. 1a) was entered on November 14, 1966. The peti-

[1] "J.A." refers to the Joint Appendix in the court of appeals and "Pet. App." to the appendix to the petition for certiorari.

tion for a writ of certiorari was filed on February 13, 1967. The jurisdiction of this Court is invoked under 12 U.S.C. 1254(1).

QUESTION PRESENTED

In 1963, Societe Internationale and the Attorney General of the United States settled the litigation between them relating to the ownership of certain shares of General Aniline & Film Corporation stock which had been vested by the Alien Property Custodian in 1942. So far as respondent Secretary of the Treasury is concerned, the question presented is whether petitioners' actions (1) to enjoin that official from making certain payments to Societe Internationale in accordance with the terms of that settlement, and (2) to compel him to pay over more than $17,000,000 to petitioners in settlement of their private claims against Societe Internationale, were properly dismissed as unconsented suits against the United States.

STATEMENT

1. BACKGROUND

This action by petitioners to reach some $17,362,000.00 on deposit in the United States Treasury is another facet of the "Interhandel" litigation.[2] In 1942 the Alien Property Custodian, acting under the

[2] See *Societe Internationale* v. *Rogers*, 357 U.S. 197, reversing *Societe Internationale* v. *Brownell*, 243 F. 2d 254 (C.A.D.C.); *Societe Internationale* v. *McGranery*, 111 F. Supp. 435 (D.D.C.), affirmed *sub nom. Societe Internationale* v. *Brownell*, 225 F. 2d 532 (C.A.D.C.), certiorari denied, 350 U.S. 937; *Kelberine* v. *Societe Internationale*, 363 F. 2d 989 (C.A.D.C.), certiorari denied, 385 U.S. 989.

Trading with the Enemy Act, 50 U.S.C. App. 1 *et seq.*, vested stock in the General Aniline & Film Corporation owned by co-respondent Societe Internationale Pour Participations Industrielles et Commerciales, S.A. ("Interhandel"), a Swiss holding corporation. Interhandel brought suit under Section 9(a) of the Trading with the Enemy Act to compel the government to return the vested shares. This suit was finally ended in 1963 by a "Stipulation of Settlement" (J.A. 59–71) between the Swiss corporation and the Attorney General [3] filed with the district court. *Societe Internationale* v. *Kennedy* (C.A. No. 4360–48, D.D.C.).

Under the terms of the settlement, the vested General Aniline stock was sold to the public in March 1965. Of some $329,000,000 realized from the sale, approximately $120,000,000 was Interhandel's share.[4] The settlement agreement, however, expressly subjected Interhandel's share to certain indemnity provisions in favor of the government (§§ VIII and IX, J.A. 66–69). In particular, Interhandel agreed to "indemnify and hold harmless the United States, the Attorney General and all other officers, agents and employees of the United States from any and all

[3] By Executive Order No. 9788 of October 14, 1946, 11 Fed. Reg. 11981, the Attorney General succeeded to the powers and duties of the Alien Property Custodian.

[4] Pursuant to Section 39 of the Trading with the Enemy Act, 50 U.S.C. App. 39, the bulk of the government's share of the settlement proceeds was transferred to the War Claims Fund to be used in satisfying the claims of American citizens who suffered losses in World War II. See 50 U.S.C. App. 2001–2016.

claims, actions, or liabilities" which might arise from carrying out the terms of the settlement, from the operations of General Aniline & Film Corporation while under government control, and from the claims of certain other persons and of the Netherlands Government relating to the ownership of the shares sold (§ IX(2), J.A. 67–68).

To insure Interhandel's performance of its indemnity obligations, the Stipulation of Settlement provided that Interhandel's share of the proceeds of sale would be deposited in an account in its name in the Treasury and invested in U.S. Treasury obligations to "be held by the United States as security for the faithful performance by Interhandel of the indemnity obligations imposed upon it" (§§ VIII(1), VIII(4), J.A. 66–67). Should any liability be imposed which Interhandel is required by the settlement to indemnify, the government has the right to cancel an appropriate amount of those Treasury obligations (§ IX(5), J.A. 68–69). The funds in the Treasury can be released to Interhandel only when and to the extent that "the Attorney General determines that such securities are no longer needed to secure the faithful performance by Interhandel of the indemnity obligations imposed upon it by * * * this Stipulation" (§ VIII(4), J.A. 67). In the case at bar, petitioners seek to reach that indemnity fund for the purpose of satisfying their own claims against Interhandel.

2. THE INSTANT SUITS

a. Petitioners Herman A. Schmitz, *et al.*, represent the estate of the late Dietrich A. Schmitz, a former

chairman of the board of directors and president of the General Aniline & Film Corporation. On behalf of the estate, they instituted suit against Interhandel in August 1965, seeking to recover $10,000,000.00, plus interest, from that corporation. Their complaint (J.A. 22) alleged that, immediately prior to the entry of the United States into World War II, Dietrich A. Schmitz was the president and chairman of General Aniline & Film, as well as the holder of Interhandel's proxies for the General Aniline shares it owned (93 percent of the outstanding stock), thus enabling Dietrich Schmitz to control the election of General Aniline's entire board of directors (J.A. 24). The complaint further alleged that Dietrich Schmitz was a naturalized American citizen (J.A. 24) but that his brother was both a German national and the chairman of the financial board of I. G. Farbenindustrie, the largest German chemical and industrial combine (J.A. 25–26). When Interhandel's shares of General Aniline stock were vested by the Alien Property Custodian as enemy property in 1942, Dietrich Schmitz was removed from his high corporate positions with General Aniline (J.A. 26).

The complaint continued with allegations that, pursuant to authorization by Interhandel's directors (J.A. 29), Dietrich Schmitz thereafter devoted all of his efforts to the protection of Interhandel's interests in the General Aniline & Film Corporation and that "[a]s a result of decedent's almost single-handed effort, the United States government never was able to obtain proof that any German had any interest, direct or indirect, in General Aniline * * * " (J.A. 29), thus

placing Interhandel in a position to negotiate the eventual settlement of its suit with the government (*ibid.*). The complaint alleged that Dietrich Schmitz's services and expenditures in Interhandel's behalf were worth $10,000,000 and hence that his estate had a lien for that amount (plus interest) on Interhandel's share of the settlement proceeds (J.A. 31).

b. Petitioner Robert A. Schmitz is the son of the late Dietrich Schmitz. The substance of his complaint against Interhandel (J.A. 3) relates to his unsuccessful efforts, allegedly on that corporation's behalf, to sell the General Aniline stock in controversy to an American buyer (J.A. 5–6), and to his allegedly successful efforts in obtaining Charles E. Wilson (former president of the General Electric Company) to represent Interhandel in certain of its negotiations with the United States Government for the return of the vested stock (J.A. 6–10). According to the allegations of the complaint, it was through Mr. Wilson's efforts that the unfavorable "image" of Interhandel held in American government circles was erased, thereby greatly facilitating the settlement of Interhandel's suit against the United States. The complaint further alleged that the chief executive officer of Interhandel had agreed orally that in compensation for his services Robert Schmitz was to receive 5 percent of any money Interhandel might receive from the settlement of its suit; and that this agreement was intentionally not reduced to writing, and kept secret (J.A. 9). On the basis of this secret agreement, Robert H. Schmitz claimed entitlement

to, and a lien upon, $7,250,000 of the settlement proceeds, plus an additional $112,000 from Interhandel for other services rendered to that corporation.

c. The Secretary of the Treasury was also named as a defendant in both complaints, but solely to insure petitioners' recovery from the indemnity fund in the Treasury (p. 4, *supra*) in the event that their suits against Interhandel were successful. To this end, petitioners' complaints asked for court orders enjoining the Secretary from disbursing "any portion" of the fund in the Treasury representing Interhandel's share of the proceeds of settlement; appointing a receiver to hold the $17,362,000 claimed by petitioners; declaring that this sum was owing from Interhandel to petitioners; and directing that the money be paid over to petitioners from the Treasury and that process issue against Interhandel by publication (J.A. 11–12, 31–32). Petitioners served their complaints on Interhandel only by registered mail addressed to Interhandel's principal place of business in Switzerland (J.A. 13–14; 34–35).

d. Both the Secretary and Interhandel moved to dismiss the complaints. The district court, in a consolidated opinion covering both actions, ruled in favor of the defendants. As to the Secretary, the court ruled that the suit was in reality one against the United States, since the relief sought would expend itself on funds in the Treasury in which the government had a substantial interest and which could not be disbursed except in the discretion of the At-

torney General; that the United States had not consented to the suit and, therefore, that the court lacked jurisdiction to entertain it; and that petitioners' offer—made in court—to "postpone" their lien on the funds until the United States had no further interest in them was insufficient to provide a jurisdictional basis for the suits (J.A. 50–54). At the same time, the court ruled that petitioners' suit against Interhandel could not be entertained, since the complaints were insufficient to establish an equitable lien and, therefore, did not provide a valid basis for substituted service upon Interhandel (J.A. 52).

The Court of Appeals for the District of Columbia Circuit "affirmed on the opinion of the District Court" (Pet. App. 1a–2a), citing as additional authority its intervening decision in *Kelberine* v. *Societe Internationale*, 363 F. 2d 989, certiorari denied, 385 U.S. 989. *Kelberine* was a similar suit by private individuals to reach the settlement proceeds in the Treasury in order to satisfy claims against Interhandel, and had also been dismissed as an unconsented suit against the United States.

ARGUMENT

The decision below, affirming the district court's dismissal of the complaint against the Secretary of the Treasury, is clearly correct. There is no conflict or other occasion warranting review by this Court.

1. It is fundamental that in the absence of an express waiver of sovereign immunity no court may en-

tertain a suit against the United States,[5] and that an action nominally brought against a government official is against the United States "if 'the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration,' *Land* v. *Dollar*, 330 U.S. 731, 738 * * *, or if the effect of the judgment would be 'to restrain the Government from acting, or compel it to act,' *Larson* v. *Domestic & Foreign Corp.*, [337 U.S. 682] at 704 * * *." *Dugan* v. *Rank*, 372 U.S. 609, 620. Since petitioners' avowed purpose in naming the Secretary of the Treasury as a defendant was to reach a large sum of money in the United States Treasury and to prevent the carrying out of the terms of an agreement settling a major lawsuit against the government, the district court rightly held that "the action is clearly one against the United States which has not consented to be sued" (J.A. 52) and must be dismissed.

Petitioners do not contend that the government has in any way consented to their suit, as indeed it has not.[6] Rather, they invoke the exception to the prin-

[5] *Mine Safety Co.* v. *Forrestal*, 326 U.S. 371; *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682; *Malone* v. *Bowdoin*, 369 U.S. 643; *Dugan* v. *Rank*, 372 U.S. 609; *Hawaii* v. *Gordon*, 373 U.S. 57.

[6] While petitioners have reprinted 40 U.S.C. 308 and 309 in their petition (pp. 3–4), they concede (p. 15) that "sections 308 and 309 do not contain any consent to sue the government." This concession is not surprising in view of the express language of § 308 that:

"Nothing herein contained shall, however, be considered as recognizing or conceding any right to enforce by seizure, arrest, attachment, or any judicial process, any claim against any property of the United States, or against any property held, owned, or employed by the United States, or by any department

ciple of sovereign immunity announced in *Houston* v. *Ormes*, 252 U.S. 469,[7] and *Mellon* v. *Orinoco Iron Co.*, 266 U.S. 121.[8] Applying the principle that mandamus

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thereof, for any public use, or as waiving any objection to any proceeding instituted to enforce such claim."

Section 309 merely implements § 308 (J.A. 53).

[7] In *Houston* v. *Ormes*, Congress had appropriated a $1,200 fund to satisfy a Court of Claims award to an individual and had referred the fund to the Secretary of the Treasury for disbursement. The plaintiff's attorney sought to impress an "equitable lien" upon the fund. This Court allowed the lien, holding that joining the Secretary of the Treasury and the Treasurer of the United States in the action did not make it a suit against the United States since only a "ministerial" duty involving no "discretion" remained to be performed, and that the government officials could be ordered as individuals to surrender the fund to a receiver appointed by the Court. In reaching that conclusion, the Court stressed that the United States had absolutely no claim or interest in the fund and that, inasmuch as the attorney's nonresident client had voluntarily appeared and personal jurisdiction had been obtained over her, she could be required to give a good acquitance to the United States, which would thereafter be excused from liability for the $1,200.

[8] In *Mellon* v. *Orinoco Iron Co.*, the Secretary of the Treasury and the Treasurer of the United States had possession of a specific fund, appropriated by Act of Congress, which the Department of State had obtained from Venezuela on behalf of United States citizens as reparations for appropriation of their property rights in Venezuela. The government officials proposed to pay this fund to Orinoco Company, Limited. The Orinoco Iron Company, another claimant, brought an action to enjoin the officials from making this payment on the ground that it was entitled to a portion of the proceeds. The Court sustained an injunction restraining the payment on the grounds that the Orinoco Iron Company had a valid equitable lien upon this fund and that the government officials conceded that they were stakeholders and had no remaining duties other than the ministerial act of payment.

will lie to compel government officials to perform ministerial duties, those cases hold that, where a specific fund in which the government has no interest has been appropriated for payment to a designated individual and is in the possession of the Secretary of the Treasury for the purpose of payment, one claiming an "equitable lien" on that fund may enjoin its payment pending his action against the beneficial owner. The cases stress, however, that such relief is "[c]onfined, as it necessarily must be, to cases where the officials of the Government have only a ministerial duty to perform" (252 U.S. at 473; 266 U.S. at 126)—that is, where "payment of the fund in question to the [designated individual] is a ministerial duty, the performance of which could be compelled by mandamus" (*ibid.*).

Those cases do not help petitioners.[9] Under the Stipulation of Settlement, the government has a direct interest in the funds it is holding. Should occasion arise to invoke the indemnity provisions of the Settlement, the government may apply the funds without leave of any court (§ IX(5), J.A. 68–69).[10] Nor can payment of the funds to Interhandel be compelled by mandamus. Such payments are only to be

[9] *Barnes* v. *Alexander*, 232 U.S. 117, also cited by petitioners (Pet. 11), was not an action to which the United States was a party, nor did it involve funds in the Treasury.

[10] The statement at page 17 of the petition that the United States has no interest in the indemnity fund which it holds "other than a right to go to court to attempt to foreclose upon it in the event that Interhandel fails to perform its obligations" is contrary to the express terms of the Settlement Agreement. See § IX(5) (J.A. 68–69). See, also, *Kelberine* v. *Societe Internationale*, *supra*, 363 F. 2d at 994.

made "from time to time, as determined by the Attorney General, to the extent that the Attorney General determines that such securities are no longer needed to secure the faithful performance by Interhandel of the indemnity obligations imposed upon it by Section IX of this Stipulation" (§ VIII(4), J.A. 67), and mandamus will not issue where a decision to act or not to act is left to the discretion of a responsible official (*Panama Canal Co.* v. *Grace Line, Inc.*, 356 U.S. 309, 318).

The Court of Appeals for the District of Columbia Circuit [11] recently rejected a similar suit by other private individuals to tap the same fund petitioners here seek to reach, stating (*Kelberine* v. *Societe Internationale*, 363 F. 2d at 994):

> [I]t is amply clear that the United States has an interest in these securities and that its officers are performing official duties involving judgment and discretion, not mere ministerial chores. The action was to require these officers to turn over to plaintiffs these securities and also to prevent them from carrying out the obligations of the stipulation of settlement. Thus the action is against the United States, which has not consented to it. It was correctly dismissed.

[11] This Court denied certiorari in *Kelberine* four months ago. 385 U.S. 989, 1044. Petitioners seek to distinguish *Kelberine* on the ground that the plaintiffs there did not assert an equitable lien on the funds in the Treasury (Pet. 20). But the opinion in that case states expressly that the question of the presence or absence of an equitable lien was "immaterial" to its decision that the action was properly dismissed as an unconsented suit against the United States. See 363 F. 2d at 995.

2. Petitioners also argue that they may maintain this action because they are willing to postpone receipt of the money to which they claim entitlement until the government is satisfied that it can be disbursed without injury to its security interest. The same argument was made by counsel in *Kelberine, supra,* and not accepted by the court of appeals. As the district court in this case noted (J.A. 53), petitioners cite no authority which supports jurisdiction over the United States on this "postponed lien" theory.[12] *Houston* v. *Ormes* and *Mellon* v. *Orinoco Iron Co.* carve out a narrow exception to the rule that the government may not be sued without its express consent and petitioners do not come within this exception. *Kelberine* v. *Societe Internationale, supra.*

3. Petitioners urge finally (Pet. 22) that "equitable principles" require that they be permitted to press their liens at this time. Their lawsuits, however, arise entirely out of secret private arrangements al-

[12] As we noted above, pp. 9–10, n. 6, 40 U.S.C. 308 and 309 expressly disavow the creation of any right to claim property in the government's possession. The other authorities cited by petitioners do not support their arguments. *Stevan* v. *Union Trust Co.*, 316 F. 2d 687 (C.A.D.C.), was not a suit against the United States. In *United States* v. *Leventhal*, 316 F. 2d 341 (C.A.D.C.), it was the United States that was asserting the priority of its tax lien on property in the custody of the court. *Hawley* v. *Hawley*, 114 F. 2d 745 (C.A.D.C.), was a suit between private parties only. The case did not, therefore, even purport to consider the jurisdiction of the district court to entertain actions against the United States. In *Doerschuck* v. *Mellon*, 55 F. 2d 741, 744 (C.A.D.C.), the court of appeals carefully noted that—unlike the instant proceeding—the money in the Treasury was "a special fund to which the United States make no claim and assume no liability."

legedly entered into between themselves and Interhandel. Those agreements were in no way intended to confer benefits upon the United States government, and hence it is not inequitable for the United States to withhold its consent to be sued.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari to review the judgments in favor of the Secretary of the Treasury should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1062

ROBERT A. SCHMITZ, *Petitioner,*

v.

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HERMAN A. SCHMITZ, ROBERT A. SCHMITZ and LLOYD J. VAIL, Executors of the Estate of Dietrich A. Schmitz, deceased, *Petitioners,*

v.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF RESPONDENT SOCIETE INTERNATIONALE, ETC. IN OPPOSITION

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March 1967

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QUESTION PRESENTED

The question presented by petitioners is not stated completely or fairly. It fails to state that the indemnification fund cannot be distributed to respondent So-

ciete Internationale, etc. (Interhandel) until such time as the Attorney General, in his unfettered discretion, determines that the interests of the United States no longer require that the fund be retained in the United States Treasury as security to protect the United States against loss.[1]

The real question presented is whether petitioners' cases are different in any material aspect from cases in which this Court and the Court of Appeals have enunciated principles which by now are well and long established.

COUNTERSTATEMENT OF THE CASES

Petitioners' "Statement of the Cases" is bottomed upon the averments of the two complaints. While it is true that controverting answers were not filed by this respondent, its motions to dismiss and/or to quash service of process were supported by affidavits in which this respondent denied every material averment upon which petitioners relied to support their respective claims for relief (R. 15-17, 19, 36-42).

The district judge did not find it necessary to resolve the conflict between the parties as to the *factual basis*

[1] Petitioners' "Question Presented" concludes with the statement that they are precluded from "the effective litigation" of their claims. On January 11, 1967, petitioners instituted new suits against this respondent in the District of Columbia (Civil Action Nos. 85-67 and 87-67) and on January 19, 1967 effected *in personam* service of process on John J. Wilson as Interhandel's agent, pursuant to the ruling in *Kelberine* v. *Societe Internationale, etc.*, — U.S. App. D.C. —, 363 F. 2d 989, cert. denied, 35 U.S. Law Week 3210, December 12, 1966, — U.S. —, 17 L. Ed. 2d 450, pet. to reh. denied, 35 U.S. Law Week 3254, January 23, 1967, — U.S. —, 17 L. Ed. 2d 688.

for the existence of an equitable lien (R. 54).[2] Instead, by reason of the status of the fund in the Treasury, Judge Pine decided that no equitable lien could exist as a matter of law.

REASONS FOR DENYING THE WRIT

No novel questions are presented.

The instant petition is actually directed at the respondent Secretary of the Treasury. Respondent Interhandel's position is subordinate to and dependent upon the status of the United States Government. This respondent will not encroach upon the area of the respondent Secretary's contentions, other than to state that it fully agrees with them.

The district judge's opinion is dispositive of all of petitioners' arguments. He examined the Settlement Agreement between Interhandel and the Attorney General (R. 59, esp. Sections VIII and IX, R. 66-69), outlining the indemnity features and the discretionary functions of the Attorney General, just as the Court of Appeals did in *Kelberine* v. *Societe Internationale, etc., supra.* Then Judge Pine discussed the well known line of cases in this Court and the Court of Appeals[3]

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[2] Interhandel had argued below that in the face of the sworn denials averments of the complaints could not be accepted as true. See *KVOS* v. *Associated Press*, 299 U.S. 269, 81 L. Ed. 183 (1936); *McNutt* v. *General Motors Acceptance Corporation*, 298 U.S. 178, 80 L. Ed. 1135 (1936); and *Chase* v. *Wetzlar*, 225 U.S. 79, 56 L. Ed. 990 (1912). A case squarely in point, and to the same effect as the foregoing cases, is *Spears* v. *Spears*, 162 F. 2d 345 (6th Cir. 1947), cert. den. 331 U.S. 790, 91 L. Ed. 1819 (1947).

[3] *Houston* v. *Ormes*, 252 U.S. 469, 64 L. Ed. 667 (1920); *Mellon* v. *Orinoco Iron Company*, 266 U.S. 121, 69 L. Ed. 199 (1924); *Doerschuck* v. *Mellon*, 60 App. D.C. 383, 55 F. 2d 741 (1931); and *McCormack* v. *Harrah*, 60 App. D.C. 260, 51 F. 2d 316 (1931).

and applied their principles to the cases at bar in the following two paragraphs (R. 51-52):

> "Over the years there have been a number of actions of a similar character which have been filed in this court seeking to impress an equitable lien on a fund in the United States Treasury. Several have been taken to the Court of Appeals, and two to the Supreme Court. [The Judge then cited the four cases appearing in footnote 3 to this brief] It would needlessly burden this Opinion to discuss these cases separately, because the principle of law announced therein is unvarying and identical, and it is this: In order to impress an equitable lien upon a fund in the United States Treasury, it is necessary that there exist several elements, namely, the Treasury officials must be charged with the performance of no duty other than the ministerial duty of making disbursement of the fund. It must be such a duty as could be compelled by mandamus, or a receivership. The United States must not be in the position of a debtor or creditor, but the fund must be an especially earmarked account to which the Treasury officials are under no other responsibility than that of the ordinary stakeholder, and the United States must have no claim or interest in the fund.
>
> "Applying these principles to the instant case, there would seem to be no doubt that these necessary elements are lacking. Here the United States has a direct and real interest, namely, the retention of the fund to indemnify it and certain federal officials from liability arising out of the sale of GAF stock. Here the defendant Secretary has no right to make any disposition of the fund except upon the order of the Attorney General. Here the Attorney General is not a party to the suit, and if he were, clearly his duties in connection with the fund are not ministerial but involve discretion. Here neither the United States nor defendant Sec-

retary is a mere stakeholder, but he is holding the funds for the benefit of the United States. Here the action is clearly one against the United States which has not consented to be sued."

Judge Pine's clear and simple reasoning reflects not only that the lower courts' decisions are *not* wrong, but that these cases do not involve any novel phase of the attempted use of mandatory action to attach funds in the hands of the United States Government. See *Kelberine* v. *Societe Internationale, etc., supra.*[4]

CONCLUSION

The petition should be denied.

Respectfully submitted,

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March 1967

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[4] Petitioners' effort to distinguish *Kelberine* is without merit. True, no equitable lien was asserted in that case, but the Court of Appeals held that the plaintiffs there could not maintain their suit against the government-official defendants because of its non-consented character and the discretionary functions involved. This is the threshold question here; and because of these principles, no equitable lien can be asserted against the fund in the Treasury. Hence, the same result is reached even if petitioners' allegations constitute a *factual basis* for an equitable lien.